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No. 94-925

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, *et al.*,
Petitioners,

v.

JOHN W. HECHINGER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners hereby reply to the Opposition Brief filed by respondents John W. Hechinger, *et al.*[1] At the most fundamental level, respondents fail to refute petitioners' arguments for granting a writ of certiorari; nor do respondents suggest any material reason for denying certiorari here.[2] While petitioners agree with intervenor United

[1] As used herein, "App." refers to the appendix accompanying the Petition (dated November 22, 1994).

[2] Significantly, the Opposition Brief devotes extensive discussion to the legislative history of the now superseded Metropolitan Washington Airports Act of 1986, App. at 42a ("Transfer Act"). The relevant question today is whether the new statute as enacted in 1991 passes constitutional muster. Whatever relevance the 1991 legislative history may have in analyzing the 1991 Amendments to the Transfer Act, it is clear that the history of the repealed sections of the 1986 Act is irrelevant.

States that certiorari should be granted and that this case should be scheduled for briefing and argument, petitioners strongly disagree with the United States' lengthy discussion of the merits. Although it is neither necessary nor appropriate to respond to all of the United States' merits arguments at this stage of the proceedings, petitioners note that these arguments dramatically demonstrate that the issues presented in this case are, as the United States concedes, certworthy and of "constitutional significance," Brief for the United States at 9, 17 ("U.S. Brief"), raising new issues not addressed in *Metropolitan Washington Airports Auth. v. Citizens For Abatement of Aircraft Noise*, 501 U.S. 252 (1991) ("*CAAN*"), or any precedent of this Court.

1. Respondents repeatedly characterize the 1991 Amendments to the Transfer Act, App. at 69a ("1991 Amendments"), as superficial or "cosmetic." *See* Opposition Brief at 1, 8, 17 (hereinafter "Opp. Br."). But the court below explicitly recognized that the 1991 Amendments "effected major changes in the composition and powers of the Board," and "*eliminate*[*d*]" the unconstitutional provisions of the original Transfer Act. *Hechinger v. Metropolitan Washington Airports Auth.*, 36 F.3d 97, 98 (D.C. Cir. 1994); App. at 3a, 2a (emphasis added). It is simply disingenuous for respondents to suggest that measures such as removal of the Board's veto power, removal of Congress' power to revoke appointments, and repeal of the requirement that members of the Board be Members of Congress are merely "cosmetic." In fact, the court below specifically based its holding on *new* provisions in the 1991 Amendments relating to completely different qualifications for Board membership and much more limited oversight powers of the Board. *Id.* at 98; App. at 2a. Thus, the court below acknowledged that these provisions raised new constitutional issues not addressed in *CAAN* and never reviewed by this Court. *Id.*; App. at 2a.

2. Respondents erroneously contend that when drafting the 1991 Amendments, Congress did not seriously

consider—and did not intend to consider—constitutional questions. Opp. Br. at 7-8. Yet respondents themselves cite legislative history demonstrating that Congress believed "[a] solution must be found that will provide a *constitutional* mechanism for congressional participation in the authority's decision-making process." Opp. Br. at 7 (quoting *Amendments to the Metropolitan Washington Airports Authority Act of 1986*, 102d Cong., 1st Sess. 36 (1991) (statement of Rep. Payne) (emphasis added) ("*1991 Hearing*")). The record shows that constitutional experts submitted lengthy and sophisticated statements and memoranda describing various ways in which the Transfer Act might be amended to cure the constitutional deficiencies identified by this Court. *See 1991 Hearing* at 200-11; 137 Cong. Rec. H10347-50 (daily ed. Nov. 18, 1991). Significantly, Members of Congress asked these experts a series of probing questions about their opinions. *See 1991 Hearing* at 138-49. Ultimately, Congress relied upon these experts' extensive analyses to conclude specifically that "[t]his legislation will stand the test of constitutionality." 137 Cong. Rec. H10347 (statement of Rep. Oberstar). This Court has recognized "Congress' institutional competence as the National Legislature" to interpret the Constitution, *see Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 563 (1990), and has further recognized that, "[t]he Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). These principles clearly support the granting of a writ of certiorari here, where Congress conscientiously considered the constitutionality of legislation that a lower court has now held unconstitutional. The United States supports this position. *See* U.S. Brief at 9, 10, 17.

3. Citing differences in the relevant statutes (1991 Amendments versus Competition in Contracting Act), respondents claim that there is no conflict between the decision below and the decisions of the Third and Ninth

Circuits in *Ameron, Inc. v. United States Army Corps of Eng'rs*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1988), and *Lear Siegler, Inc., Energy Products Div. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988), *irrelevant portion withdrawn en banc*, 893 F.2d 205 (9th Cir. 1989). But the differences cited by respondents ignore the fundamental point. Both *Ameron* and *Lear Siegler* hold that a federal statute does not violate separation of powers principles unless it allows Congress (or one of its agents) to exercise ultimate control over an agency's decisions absent passage of legislation. *See Lear Siegler*, 842 F.2d at 1108; *Ameron*, 809 F.2d at 986. In direct contrast to the holdings in those cases, the court below held that separation of powers principles may be violated where an agent of Congress merely has the power to influence the timing of an agency's decisions. *See Hechinger*, 36 F.3d at 105; App. at 18a. This important distinction, which clearly has led to a split among the circuits, has not been addressed by this Court.[3] Significantly, this Court granted certiorari in a case that involved the control versus influence question, but that case was dismissed on jurisdictional grounds. *See Federal Election Comm'n v. NRA Political Victory Fund*, 1994 U.S. LEXIS 8790 (1994).

4. Respondents incorrectly assert that the lists provided by the Speaker of the House of Representatives and the President *pro tempore* of the Senate are not advisory. Opp. Br. at 9. The statute plainly states that the names on the lists are "recommendations." 49 U.S.C. App. § 2456(f)(1); App. at 95a. Furthermore, the lists of recommendations are not exhaustive; the statute specifically allows the Authority to request additional names if

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[3] The United States argues that *Ameron* and *Lear Siegler* were incorrectly decided, *see* U.S. Brief at 16, thus implicitly acknowledging a split between the court below and the Third and Ninth Circuits on this issue. Nonetheless, the Government unsuccessfully attempts to distinguish those two cases in minor aspects, much as respondents do. *See* U.S. Brief at 16-17.

it is unsatisfied with the suggested names. *Id.* The plain language of the statute thus demonstrates that Congress does not control, much less carry out, the appointment of Board of Review members.

Even though the 1991 Amendments expressly empower the Airports Authority to appoint and remove Board of Review members, the Government persists in arguing that the Board of Review is a congressional agent because Congress sends up lists of recommended appointments and has delineated by statute qualifications for office. *See* U.S. Brief at 10. This surprising departure from the United States' longstanding positions on this issue is unwarranted. *See, e.g.*, 4 Op. Att'y Gen. 162, 164-65 (1843) (recognizing that provisions regarding appointments should be read to preserve constitutionality, Congress may require Secretary of Treasury to appoint permanent inspectors from nominations received from collectors who are not constitutionally empowered to make such appointments); Petitioners' Brief at 24 n.13 (*citing* 29 Op. Att'y Gen. 254, 256 (1911)); *see also* Brief of United States as *Amicus Curiae* at 18 n.12, *Federal Election Comm'n v. NRA Political Victory Fund*, 1994 U.S. LEXIS 8790 (1994) (No. 93-1151) (agreeing with court of appeals that respondents "lack standing" to challenge constitutionality of statutory requirement that Commission have bipartisan membership because it "is difficult, if not impossible to determine" whether such requirements "actually served to limit" the appointer's choices). Certiorari is warranted to clarify Congress' constitutional power, long recognized by this Court, *see, e.g., Myers v. United States*, 272 U.S. 52, 128-29 (1926), to establish procedures and qualifications for appointment to public office.

5. Contrary to the United States' characterization, *see* U.S. Brief at 10, petitioners strongly dispute that any power exercised by the Board is that of the federal government. *See* Petitioners' Brief at 19 n.10. In *CAAN*, this Court held that the Board of Review "exercises suffi-

cient federal power *as an agent of Congress* to mandate separation of powers scrutiny." *CAAN*, 501 U.S. at 269 (emphasis added). However, the 1991 Amendments altered the Transfer Act such that the new Board of Review is no longer restricted to congressional officials and is appointed and removed by the Authority under interstate compact law. That Board is no longer an agent of Congress but rather exercises power derived solely from an interstate compact agency.[4]

6. The United States suggests that the Board must be considered an agent of Congress if it is likely to "reflect Congress's underlying interests and wishes." *See* U.S. Brief at 12. This argument leads to the odd result that anyone who agrees with Congress must be considered an agent of Congress. In any event, the United States further argues that because Congress plays a recommendatory role in the nomination of candidates for the Board of Review, Board of Review members are likely to reflect Congress' underlying interests and wishes.[5] *Id.* Using

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[4] While the Board of Review may remain an entity created "at the initiative" or suggestion of Congress, this factor, by itself, is insufficient to render the Board an agent of Congress. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

[5] The United States asserts that the criteria for membership on the Board of Review "are tilted in favor of Members of Congress, indicat[ing] that Congress continues to view the Board as its agent." *See* U.S. Brief at 11. But the criteria for membership on the Board of Review are neutral, and indeed were enacted in direct response to this Court's holding in *CAAN*. *See* Petitioners' Brief at 23-24. Many people other than sitting Congresspersons are eligible for membership on the Board of Review, as is evidenced by the membership of Drew Lewis, former Secretary of Transportation, and, as of January 3, 1995, by the membership of four individuals who are no longer Members of Congress. Indeed, a majority of the present Board of Review members are not Members of Congress. Examples of other potential candidates for membership on the Board of Review include most present and former state governors and transportation officials, former cabinet and subcabinet officers, academics, representatives of aviation concerns, former federal

such reasoning, however, each of the Justices of this Court would be considered agents of the Executive and subject to the Executive's will, because each was nominated by the Executive. Contrary to the test proposed by the United States, the true test of whether an entity is an agent of Congress is whether Congress can control that entity if it acts contrary to Congress' interests and wishes. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986) (discussing officer under Congress' control and noting that desire to avoid removal by pleasing Congress creates "here-and-now subservience" to that branch). Under the 1991 Amendments, Congress no longer possesses any means of controlling members of the Board of Review. *See* 49 U.S.C. App. § 2456(f)(11); App. at 105a.

7. Respondents incorrectly assert that the Board of Review is unconstitutional because its members are not appointed in accordance with the Appointments Clause. *See* Opp. Br. at 20. The Appointments Clause applies only to Officers of the United States who exercise significant authority pursuant to the laws of the United States. *See Buckley v. Valeo*, 424 U.S. 1, 124-26 (1976). Members of the Board of Review are not federal officers, but instead are officers of an interstate authority which was created pursuant to an interstate compact between Virginia and the District of Columbia.[6] Similarly, Board of

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judges and former Congresspersons—categories which include a large number of potential nominees.

[6] Ironically, respondents argue that members of the Board of Review are agents of Congress rather than members of the executive branch. If members of the Board of Review are agents of Congress (a fact which petitioners strongly dispute), then they are not subject to the Appointments Clause in any event. *See Buckley*, 424 U.S. at 128 ("[N]othing in our holding with respect to Art. II, § 2, cl. 2, will deny to Congress 'all power to appoint its own inferior officers to carry out appropriate legislative functions.' "). Even if the Board of Review were an agent of Congress, pursuant to the 1991 Amendments, it exercises only powers that Congress could have delegated to one of its own committees. *Id.* at 137.

Review members do not exercise authority pursuant to the laws of the United States. Under the 1991 Amendments, the Board of Review advises the Authority but does not control the Authority's actions. Rather, the Board of Review makes recommendations only "in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not 'Officers of the United States.'" *Id.* at 137-39.

As noted in the Petition, this case involves (1) an Act of Congress held unconstitutional by a lower court despite Congress' careful attention to the constitutional issues presented, (2) a split between the circuits regarding whether mere influence exercised by a purported agent of Congress over a non-congressional agency constitutes a violation of separation of powers principles and (3) significant constitutional issues regarding the ability of Congress to prescribe qualifications and suggest nominees for non-congressional offices. For the foregoing reasons and those previously stated, this Petition for a Writ of Certiorari should be granted, and this case should be scheduled for briefing and argument.

Respectfully submitted,

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